DEC 4 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 614 and 665

HAPAG-LLOYD, A.G., as owner of the M/V BRANDENBURG, and as bailee of cargo laden thereon, and STORK AMSTERDAM N.V., *et al.*, as owners of certain cargoes laden thereon,

Petitioners,

—against—

TEXACO PANAMA, INC., as owner of the M/V TEXACO CARIBBEAN,

Respondent.

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of HAGEN PASTEWKA, Deceased, and MONICA PASTEWKA, Individually,

Petitioners,

—against—

TEXACO, INC., and TEXACO PANAMA, INC.,

Respondents,

and Consolidated Cases.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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In the

Supreme Court of the United States

October Term, 1975

Nos. 614 and 665

Hapag-Lloyd, A.G., as owner of the M/V Brandenburg, and as bailee of cargo laden thereon, and Stork Amsterdam N.V., *et al.*, as owners of certain cargoes laden thereon,

Petitioners,

—against—

Texaco Panama, Inc., as owner of the M/V Texaco Caribbean,

Respondent.

Thomas I. Fitzgerald, Public Administrator of the County of New York, Administrator of the Estate of Hagen Pastewka, Deceased, and Monica Pastewka, Individually,

Petitioners,

—against—

Texaco, Inc., and Texaco Panama, Inc.,

Respondents,

and Consolidated Cases.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Statement

Petitioners, Hapag-Lloyd, A. G., et al (Docket No. 75-614) (hereinafter referred to as "Petitioner Hapag-Lloyd"), and Thomas I. Fitzgerald, etc. (Docket No. 75-665)

(hereinafter referred to as "Death Claimant Petitioners"), seek review of an order of the United States Court of Appeals, Second Circuit (1b).[1] This brief is presented in opposition to the two petitions filed on October 23, 1975 and November 3, 1975, respectively.

Opinions Below

On March 26, 1974, the United States District Court for the Southern District of New York issued its decision ordering the subject actions dismissed on the ground of *forum non conveniens* (26b). That decision was based on three separate, extensive reports of the Magistrate, issued after several lengthy hearings, and upon voluminous letters from counsel, answers to interrogatories, documents furnished pursuant to Requests for Production and all other pleadings and proceedings in the matter. On March 28, 1974, the District Court entered its Judgment and Order dismissing the actions (380a). Thereafter, all of the plaintiffs below appealed to the United States Court of Appeals for the Second Circuit.

On June 25, 1975, the Second Circuit, one judge dissenting, handed down its opinion affirming the order of dismissal on the grounds that the lower Court properly exercised its discretion and that on balancing all the relevant factors, including choice of law, the actions properly belonged in England (1b). So strong in fact was it believed that these actions belonged in England, that

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[1] The Second Circuit's opinion is officially reported, as modified on denial of rehearing, at 521 F. 2d 448. Reference to Petitioner's appendix will be designated by "b"; reference to the record will be designated by "a"; reference to Petitioner Hapag—Lloyd's brief will be designated "HG"; reference to Death Claimant Petitioners' brief will be designated "DC".

Circuit Judge Mansfield felt constrained to hand down a separate concurring opinion (22b).

Furthermore, on July 25, 1975, the Second Circuit denied petitioners' motion seeking rehearing (24b) and on August 6, 1975 the Chief Judge of said circuit denied petitioners' request for a hearing *in banc* "no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion" (25b).

Questions Presented

Whether this Honorable Court should grant a Writ in a matter involving the discretion of the lower Courts, particularly where there is no conflict in the circuits on the issues involved and where there is no substantial question of federal law?

Constitutional Provisions, Treaties, Statutes, Ordinances, or Regulations Concerned

None are properly involved.

Statement of Case

This litigation arises out of the collision on January 11, 1971 in the English Channel[2] between the M/V PARACAS and S/T TEXACO CARIBBEAN and the alleged subsequent allision on January 12, 1971, between M/V BRANDENBURG and the hulk of the Panamanian Flag vessel, TEXACO CARIBBEAN, as it lay on the bottom of the

[2] The collision occurred within 12 miles of the English Coast on waters within the territorial fishing limits of England, and over which Her Majesty's Coast Guard supervises traffic.

English Channel near Mid Varne Buoy and involves the following consolidated actions (2b-3b):

(1) Twelve actions commenced on various dates in December, 1972 and January, 1973 by the Public Administrator of the County of New York on behalf of the representatives of deceased German seamen aboard the M/V BRANDENBURG against Texaco Inc. and Texaco Panama Inc.

(2) An action commenced on or about January 9, 1973 by the Owners of the M/V BRANDENBURG against Texaco Panama Inc.

(3) An action commenced on or about January 10, 1973 by the Owners of cargo laden on board the M/V BRANDENBURG at the time of the alleged allision against Texaco Panama Inc.

In addition to the above-described actions which are the subject of the present Petitions for Writs of Certiorari, the following related actions are pending:

(a) *In England:*

(1) An action commenced on May 16, 1972 by the Owners of cargo laden on board the M/V BRANDENBURG against the Owners of the M/V PARACAS, the Owners of the S/T TEXACO CARIBBEAN and the Corporation of Trinity House.

(2) An action commenced on May 18, 1972 by the Owners of the S/T TEXACO CARIBBEAN against the Owners of the M/V PARACAS.

(3) An action commenced on December 7, 1972 by the Owners of the M/V PARACAS against the Owners of the S/T TEXACO CARIBBEAN.

(4) An action commenced on January 19, 1973 by the Owners of the M/V BRANDENBURG against the Corporation of Trinity House.

(5) An action commenced on or about December 29, 1972 by the Owners of cargo laden on board the M/V PARACAS against the Owners of the S/T TEXACO CARIBBEAN.

(6) An action commenced on or about January 10, 1973 by the Owner of additional cargo laden on board the M/V BRANDENBURG against the Owners of the S/T TEXACO CARIBBEAN.

(b) *In the United States District Court, District of Delaware:*

(1) Twelve actions commenced on or about January 9, 1973 by the heirs and representatives of deceased German Seamen aboard the M/V BRANDENBURG against Texaco Inc. and Texaco Panama Inc. These twelve actions are virtually identical to the twelve actions pending in this Court.[3]

Facts

The facts pertinent to these petitions are as follows:

1. Texaco Panama Inc. (hereinafter "TEXPAN") was at all material times a Panamanian corporation with its principal place of business in Panama and was the sole owner of the TEXACO CARIBBEAN, a tank vessel registered under the laws of the Republic of Panama (63a, 73a).

[3] It should be noted that having lost in the lower Court and the Circuit Court in New York, wrongful death petitioners are now actively prosecuting the twelve actions in Delaware, while at the same time burdening this Court with the present Petition.

2. At all material times the TEXACO CARIBBEAN was managed, operated and controlled by Texaco Overseas Tankship Limited (hereinafter "TOT"), a British corporation, having offices at London, England and Monte Carlo, Monaco (73a, 76a).

3. At no time has Texaco Inc. (hereinafter "TEXACO") ever owned, operated, controlled or had a proprietary interest in the TEXACO CARIBBEAN, nor at any of the times mentioned in the complaints was it the charterer of the vessel or the owner of any cargo aboard said vessel (94a-95a). Texaco has no connection with this matter whatsoever other than the fact that it was served with process herein.

4. That upon information and belief, at all times mentioned in the complaints herein the M/V PARACAS was owned and operated by Naviera Maritima Fluvial, S.A. (hereinafter "NAVIERA"), a Peruvian corporation with offices at J.R. Rufino Torrico 873, Lima, Peru. Naviera does not maintain an office in the United States and is not a party to the litigation here in the United States (63a) although it is a party to the litigation pending in England (82a).

5. The Corporation of Trinity House (hereinafter "TRINITY HOUSE") was and is a British corporation with offices at Tower Hill, London EC3, England, and was and still is the owner of the vessel SIREN. Trinity House does not maintain an office in the United States and is not a party to the litigation here in the United States (63a, 77a) although it is a party to the litigation pending in England (82a).

6. On January 11, 1971, at approximately 0405-0410 hours, the Peruvian vessel PARACAS collided with the

TEXACO CARIBBEAN in the English Channel, Dover Straits within 12 miles of the English Coast. Following the collision, the TEXACO CARIBBEAN broke in two. The forward section sank almost immediately while the stern section did not sink until approximately 1408 hours that afternoon (77a).[4]

7. TOT's London office was advised almost immediately of the collision and it began making necessary arrangements, to handle the casualty, e.g., sending personnel to the scene and in addition, advising Trinity House, the Admiralty, etc. (77a, 326a).

8. In connection with the steps taken by TOT in handling this matter, it should be noted that TOT had the necessary authority, without reference to New York or anywhere else to take all necessary steps to engage the services of anyone who might be required, i.e., salvage tugs, etc. (326a, 328a, 4b).

9. At approximately 0752 hours, Trinity House dispatched its vessel SIREN to the scene of the casualty where it arrived at about 1630 hours and moored in the immediate vicinity as a warning to other ships to keep clear. The SIREN was displaying a warning signal of three green lights at this time (77a-78a, 3b).

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[4] While it would be inappropriate for respondents to go into the merits of petitioner Hapag-Lloyed's unsupported claim that it would have been a "simple matter" to attach a buoy or marker to the partially submerged stern section (4 HP), it is interesting to note that such assertion is based on the hearsay affidavit of one Hummel who was not at the scene of the casualty, has no personal knowledge and who makes such statement based on all alleged investigation carried out curiously enough in England—a place where even petitioners themselves find it necessary to go in order to ascertain alleged factual information with regard to the merits of their claim.

10. In addition the Admiralty was broadcasting numerous navigation warnings, over its radio stations located at North Foreland and Niton (78a).

11. Thereafter, at 0730 hours, the following day, January 12, 1971, the German Flag vessel BRANDENBURG, having misinterpreted the signal displayed by the SIREN and having failed to pick up the warning signals being broadcast by radio, negligently collided with the stern section of the TEXACO CARIBBEAN, and sank immediately (30b, 78a).

12. Prior to the sinking of the BRANDENBURG, crewmembers aboard British fishing vessels in the area observed the approach of the BRANDENBURG in the vicinity of the SIREN, and after the sinking picked up the bodies of the survivors and the bodies of deceased seamen from the BRANDENBURG and brought them to Folkstone, England, where autopsies and an inquest were held (78a, 84a, 3b, 35b).

13. As a direct result of the above-described casualties, numerous suits were commenced in England, including one by the owners of the BRANDENBURG against Trinity House and several by the BRANDENBURG's cargo interest (82a, 2b-3b).

14. None of the beneficial claimants, nor any of the surviving members of the crews of any of the vessels are citizens of or reside in the United States (63a-64a, 377a, 23b, 45b).

15. While all concerned parties are before the Courts in England and are represented by counsel in England, at least two essential parties (Naviera and Trinity House)

are not present in the United States and cannot be impleaded in the present actions thereby preventing the Courts of the United States from rendering complete relief in the matter and forcing defendants to litigate in jurisdictions 3,000 miles apart (66a, 85a, 11b).

Reasons for Denying Writ

As can be seen from the foregoing facts, the present petitions concern a case involving foreign claimants, foreign vessels and owners, foreign seamen, foreign waters, foreign witnesses, foreign law and have no conceivable relationship with the United States. In essence, what the petitioners are seeking is a review by this Honorable Court of an area which this Court, in the landmark case of *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947), has stated is best left to the discretion of the lower courts. Not only are the petitioners' reasons for seeking certiorari completely without merit but, as will more clearly be seen from the discussion below, they are entirely frivolous and misleading.

POINT I

The Circuit Court properly concluded that the District Court did not abuse its discretion and that all major factors dictated dismissal.

The doctrine of *forum non conveniens,* originally developed in admiralty, *The Belgenland,* 114 U.S. 355 (1885), was most clearly enunciated and set out in the landmark decision of *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947). In that decision, this Court set forth all the applicable principles and reviewed in detail all factors considered relevant (see 330 U.S. at 507-512). Those factors are:

1. The private interest of the parties.

2. The relative ease of access to sources of proof.
3. The availability of compulsory process for the attendance of unwilling witnesses and the cost of obtaining the attendance of willing witnesses.
4. A possible view of the premises if appropriate to the action.
5. Questions of enforceability of judgments.
6. All other practical matters that make a trial easy, inexpensive and expeditious.
7. Relative advantages and obstacles to a fair trial.
8. Factors of Public interest:
   A. Administrative difficulties in congested centers of litigation.
   B. Local interest in having localized controversies decided at home.
   C. Advisability of deciding cases in the forum where they arise and whose law will be applied.
9. Plaintiffs' choice of forum.
10. Plaintiffs' vexation, harrassment or oppression of defendant by inflicting expense or trouble not necessary to plaintiffs' own right to pursue their remedy.

The *Gulf Oil* case reflects two basic considerations underlying the doctrine: first, the actual convenience of the litigants and their witnesses, and second, the absence of any interest of the forum in the controversy. In general, these two considerations are entirely complementary because the parties can most conveniently litigate the controversy in an interested forum.

In making its decision in this matter, the District Court, recognizing that *Gulf Oil* was the leading case on the issues presented, set out the factors to be considered (32b) and then proceeded to analyze the factual situation presented in light of those factors (45b).

On appeal, the Circuit Court again reviewed all the factors, applied the criteria set forth in *Gulf Oil Corp., supra* (5b et seq.), and held that:

> "Even on the plaintiffs' statement of the facts, the convenience to all parties of trying these cases in the English Courts and the vast inconvenience to all of trying the cases in New York, *overwhelmingly outweighs* the temporary convenience to the plaintiffs . . ." (6b).

and

> "The plaintiffs, moreover, will not be significantly inconvenienced by dismissal. The district court granted the motion on the express condition that Texaco submit to the jurisdiction of the courts in England where, upon court order, personnel will be available to testify and necessary documents may be produced. As the real parties in interest are either German citizens and residents or foreign corporations, it appears that a trial in England, where several are already parties to related suits, would be considerably less burdensome than a trial in New York. *The balance of convenience under these circumstances clearly tips in favor of dismissal.*" (7b-8a). [Emphasis supplied.]

Even after consideration of the various points raised by the dissent, Mansfield, C.J., in his concurring opinion stated:

> "The accident occurred right off the British coast, where the scene may be viewed with relative ease by the English court. The key witnesses are located in England and cannot be subpoenaed to appear in New York. Texaco, on the other hand, will be subject to the jurisdiction of the English courts and the defendants may in England assert claims over against Paracas and Trinity House, which they could not do in New York. Furthermore, the overwhelming majority of the other witnesses and real parties in interest (German, Dutch and Italian) are located much closer to England than to the United States.
>
> With all major indicators thus pointing to England as the logical forum even in this jet age, the plaintiffs should not be permitted to insist upon our retaining jurisdiction. . ." (23b).

It is apparent from all of the foregoing that the respondents herein met all of the requirements of *Gulf Oil Corp.* as enunciated by this Court, and that after weighing all the factors both the District Court and the Circuit Court properly found that there are most compelling reasons for dismissing these actions.

As was stated by the Circuit Court:

> "Weighing the minimal possibility that plaintiffs might be adversely affected by dismissal, against the clear prejudice which defendants would suffer if jurisdiction were retained, together with considerations of the public interest, and the factors of convenience, *we are satisfied that the district court did not abuse its discretion in this case.*" (11b). [Emphasis supplied.]

It is clear therefore that the underlying judicial action sought to be reviewed herein is the discretionary decision of the district court dismissing these actions on the ground of *forum non conveniens.*

This Court, in *Gulf Oil Corp., supra,* stated the following at page 508 regarding the discretion of the District Court in *forum non conveniens* matters:

> "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to remove ones own jurisdiction so strong as to result in many abuses."

Despite the clear and unequivocal mandates of this Court, Petitioners are nevertheless seeking review of a finding which is solely discretionary and which would serve no important purpose for future guidance of the courts and the public but would only be of benefit to the private interest of the parties concerned.

POINT II

Petitioners' arguments regarding English and American law are erroneous and in any event do not establish abuse of discretion by either the Circuit Court or the District Court.

Petitioners argue that the Courts of England do not provide them with a remedy and that therefore jurisdiction must be retained.

Petitioners' argument, however, is erroneous and without merit because (1) English law does provide a remedy—English law being basically the same as American law; (2) regardless of which forum hears the matter, English law would be applied and (3) it overlooks the fact that choice of law is only one of numerous factors to be weighed on the overall issue of *forum non conveniens.*

A. *American law regarding the duty to locate and mark a wreck is basically the same as, and is derived from the English law.*

An analysis of the two English cases relied on by petitioners in the courts below, *The Douglas*, [1882] 7 P.D. 151 and *The Utopia*, [1893] A.C. 492 indicates that the general rule in England is that after an owner relinquishes control and possession of a wreck to the cognizant governmental authority, the original owner is relieved of all further liability provided, however, that in the discharge of its duties such owner had not been guilty of wrongful conduct or neglect. Prior to such take over, however, the owner has the duty to protect other vessels and will be held liable for his negligence in carrying out that duty.

As stated by Lord Coleridge, C.J. in the *Douglas*, supra, at page 156:

> "The only question upon the evidence before us is whether the defendants were guilty of negligence;"

and further at page 158:

> "but sufficient evidence is before us to show that *all things reasonable were done;* there is no ground for finding that the master and the mate of the DOUGLAS were guilty of actionable negligence." [Emphasis supplied]

So also, Brett, L. J. held at page 160:

> "I incline to agree that if the owners of a wreck abandon it their liability ceases. But here the defendants claim the ownership of the wreck. It may be that the defendants did not hear of the accident for some time; as to those employed by them, the captain is prima facie to act; it is for the plaintiff to prove that there was negligence.

• • •

> Upon the evidence before us there was no negligence and no liability upon the defendants."

In the *UTOPIA, supra,* the Privy Council reviewed the *DOUGLAS* along with the other cases in point and summarized the liability of an owner of a wrecked vessel on page 498 as follows:

> "The result of these authorities may be thus expressed. The owner of a ship sunk whether by his default or not (wilful misconduct probably giving rise to different considerations) has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her. It is equally true that so long as, and so far as, possession, management, and control of the wreck be not abandoned or properly transferred, there remains on the owners an obligation in regard to the protection of other vessels from receiving injury from her. But in order to fix the owners of a wreck with liability two things must be shown, first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them, that is to say, has not been abandoned, or legitimately transferred, and, secondly, that they have in the discharge of their legal duty been guilty of wilful misconduct or neglect."

In summarizing these two cases the Second Circuit held that:

> "both cases clearly state that, until the port authority had assumed physical control, the owners had a duty to take all reasonable steps to protect the vessels from running afoul of the wrecks." (9b Note 6).

On the other hand a review of the leading American authorities on the subject, which incidently cite with approval both *the Douglas,* and the *Utopia,* indicates that the general rule, just as in England, is that an owner may comply with the duty to mark a wreck by getting the Coast Guard to do it and that when the Coast Guard does mark the wreck, whether properly or not, the owner is relieved of his duty in that respect. Further, that while he has a duty to mark a wreck, he is relieved of that duty when he has taken all reasonable steps under the circumstances then present. *The Plymouth,* 225 Fed. 483 (2nd Cir. 1915); *Red Star Towing & Transportation Co.* v. *Woodburn,* 18 F. 2d 77 (2nd Cir. 1927); *New York Marine Co.* v. *Mulligan,* 31 F. 2d 532 (2nd Cir. 1929); *The Snug Harbor,* 40 F. 2d 27 (4th Cir. 1930); *The Berwind-White Coal Mining Co.* v. *Pitney; The Eureka No. 110,* 187 F. 2d 665 (2nd Cir. 1951); *Morania Barge No. 140 Inc.* v. *M & J Tracy, Inc.,* 312 F. 2d 78 (2nd Cir. 1962); *Humble Oil & Refining Company* v. *Tug Crochet,* 422 F. 2d 602 (5th Cir. 1970); *The Chambers* 298 Fed. 194 (S.D.N.Y. 1924); *City of Taunton-Sunken Wreck,* 11 F. 2d 285 (E.D.N.Y. 1925); *Wilson* v. *Mitsui & Co.,* 27 F. 2d 185 (N.D. Cal. 1928).[5]

In the case of *the Plymouth, supra* at page 484, the Court stated the following with regard to the duty of the owner:

> "It is quite obvious that if the Lighthouse Department had marked this wreck of its own motion, as it might have done, the Hartford Company could not have moved the buoy or interfered with it in any way,

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[5] The case of *Ingram Corporation* v. *Ohio River Company,* 505 F. 2d 1364 (1974), relied on by petitioners to support their imagined conflict (see point III) in no way conflicts with the above stated principles. The Court in *Ingram,* supra, stated at page 1371:

> "We find no circumstances in the case before us which would dictate a result contrary to the rule of Berwind-White."

whether it thought it properly placed or not, and if the Hartford Company had itself buoyed the wreck the Lighthouse Department in the exercise of its governmental authority could have changed the location of the buoy or replaced it with another. We think the Hartford Company fully complied with the requirements of the act of 1899, when it secured the services of the Lighthouse Department. No wiser or safer course could be taken than to rely upon the resources and competency of the Lighthouse Department in such case.

• •

There is no American authority on the subject, but we think The Douglas, 7 Prob. Div. 151 (1882), exactly in point." [Emphasis supplied]

The *Berwind-White* case, *supra*, relied upon by petitioners to support their argument, does just the contrary. In that case, the Court specifically affirms its prior decision in *the Plymouth, supra*, when during its discussion of an owner's duty cites *the Plymouth* with approval, twice, and states:

"It has long been the law that an owner may comply with the statutory requirement for marking by getting the Lighthouse Department (Now the Coast Guard) to do it; when the Coast Guard does mark the wreck, whether properly, or not, the owner is relieved of any statutory duty in that respect. The Plymouth, 2 Cir. 225 F. 483, certiorari denied, 241 U.S. 675, 36 S. Ct. 725, 60 L. Ed. 1232; New York Maritime Co. v. Mulligan, 2 Cir. 31 F. 2d 532; City of Taunton-Sunken Wreck, D.C.S.D. N.Y., 11 F. 2d 285, 1927 AMC 135; The Barge Chambers, D.C.S.D. N.Y., 98 F. 194, 1924 A.M.C. 572; Wilson v. Mitsui & Co. D.C.N.D. Cal. 27

> F. 2d 185. The basis of this exception to the otherwise non-delegable duty is the fact that the private owner cannot interfere with the manner in which the government agency uses its discretion in the manner of marking. The Plymouth, supra."

It further goes on to indicate that if a Coast Guard search for the wreck is made with due diligence in light of the facts within the knowledge of the owner this too may operate to discharge the owner from his duty.

Summarizing and comparing the two statements of the law, it is clear that under either version, the owner of a wrecked vessel has the duty to protect other vessels from being damaged thereby by properly marking the wreck. The manner in which the owner performs that duty under the particular factual circumstances present determines his liability in the matter—if performed negligently he will be held liable for all resulting damages and if performed properly, he will not.

Petitioners reliance on the cases of *The Berwind-White, supra, Morania Barge No. 140, Inc., supra,* and *Ingram, supra,* is misplaced. All of those cases support the general principal of law stated above and are distinguishable on their facts alone. In all those cases, the court was dealing with a wreck on U.S. navigable waters. The court found that the owners of the wrecks had done nothing for a period of time after having been notified of the wrecks and accordingly held them liable for negligence in failing to perform their duty under the wreck statute[6] to mark the wreck.

Under English law, the result in *Berwind-White, Morania* or *Ingram,* would have been exactly the same, i.e., the owner

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[6] A statute which has no application to the case at bar since by its own terms it applies only to U.S. navigable waters.

would be held liable for *its* negligence in failing to perform *its* duty. *The Utopia, supra,* at p. 498. It should be noted that petitioners herein alleged that the defendant TEXPAN was negligent in performing its duty to locate and mark the wreck of the TEXACO CARIBBEAN and particularly so because it failed to engage the services of Smit-Tak in locating the wreck. If petitioners can establish any negligence on the part of the Owner of the TEXACO CARIBBEAN, as they allege, during the trial of this matter, under the authorities cited the result would be the same regardless of whether English or American law is applied. Under either law, TEXPAN would remain liable for its own negligence until such time as the possession and control of the vessel was officially transferred to the proper authorities or until such time as the authorities *marked* the wreck.

B. *Regardless of which forum the matter is tried in English law must be applied.*

As can readily be seen from the facts presented, United States law is a total stranger to this foreign based collision. Analyzing the factual situation in light of the choice of law standards applied by our courts, it is clear that foreign law must be applied. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382-83 (1959); *Lauritzen* v. *Larsen*, 345 U.S. 571, 582 (1953).

Interestingly enough every case cited by petitioners involved wrecks on the navigable waters of the United States and application therefore of the Wreck Statute, 33 USCA § 409. Not one of the cases cited by petitioners involves a wreck on the "high seas" or the application of either the wreck statute or U.S. General Maritime Law to such a situation. This, it is submitted is only logical since a United States Court would have no reason to arbitrarily apply

U.S. "wreck" laws to other than those bodies of water affecting U.S. navigation. On the other hand, the matter before the Court involves a wreck in the English Channel, within the territorial fishing limits of England, which while technically the high seas or international waters is more akin to the navigable waters of England—One of the countries having a direct interest in navigation and casualties occurring therein. In fact England was instrumental in having passed the Dover Strait Traffic Separation scheme to regulate traffic in the Channel and it is Her Majesty's Coast Guard that supervises traffic in the Straits of Dover. All things being considered, it would be impossible to think of a country having a more direct interest in wreck removal in the English Channel. It would be just as arbitrary for an English court to apply English wreck law to wrecks affecting the navigable waters of the United States as it would be for our courts to apply United States law to the facts and circumstances at bar.

C. *Choice of Law is only one factor to be considered on the issue of forum non conveniens and even if English law is somehow less favorable than American law, that is not evidence of abuse of discretion.*

Initially, it should be noted that the issue presented to the District Court for determination involved choice of forum (*Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 [1947] and its progeny) and *not* choice of law (*Lauritzen* v. *Larsen*, 345 U.S. 571 [1953] and its progeny); choice of law being only one of numerous factors to be considered in a *forum non conveniens* matter. See also, *Canada Malting Co.* v. *Paterson Steamship*, 285 U.S. 413 (1932) where Justice Brandeis stated at page 419:

> "We have no occasion to inquire by what law the rights of the parties are governed, as we are of the

> opinion that, under any view of the question, it lay within the discretion of the district court to decline to assume jurisdiction over the controversy."

Therefore, even were this court to find that the English law is somehow less favorable to petitioners than the American law, that fact standing alone is not evidence of the abuse of discretion required to be found to overturn the lower court's decision. *Canada Malting Co., supra.* Particularly in point here is the recent case of *Metallgesellschaft* v. *M/V LARRY L*, 1973 A.M.C. 2529 (D.C. So. Car. 1973). In that case the plaintiff, argued, as do petitioners here, that the English law regarding cargoes recovery in a collision matter would charge the cargo plaintiff with the fault of its carrying vessel thereby severely limiting the amount of any recovery, whereas under American law the cargo plaintiff would recover its damages in full. In response to that argument, the court, quoting from Judge Hoffman in the case of *Anglo-American Grain Co., Ltd.* v. *S/T Mina D'Amico*, 169 F. Supp. 908 (E.D. Va., 1959), stated at page 2535:

> ". . . 'The variance between the law of the United States and the laws of other major shipping nations leads to efforts on the part of shipowners to avoid being sued in the United States, and like efforts on the part of cargo to institute actions in the United States.' "

and further stated:

> "He [Judge Hoffman] followed the lead of the Second Circuit in Western Farmer, supra, which treated as irrelevant the matter of the rights of cargo under American law as contrasted to its rights under the Brussels Convention of 1910, which the English Court would apply. He concluded, as I do, that the ultimate

> question is whether the defendant would be unfairly prejudiced by having to defend in this jurisdiction, and that the rights of cargo interests are not a factor to consider in determining the propriety of declining jurisdiction."

In summary, it is clear, that under either petitioners' theory of liability or respondents' version of the sinking of the BRANDENBURG, there is no essential difference between the English and United States law. Furthermore, petitioners are not being deprived of a remedy and even if English law were less favorable in certain respects, this fact would not be controlling under all the circumstances here present.

POINT III

The present petitions concern a case of isolated significance; the review of which would not involve rulings on principles of public interest but merely on those of the parties.

Petitioners argue that this Court should grant the requested Writs in order to settle vital points of federal law and resolve conflicts in the Circuit Courts.

As can be seen from Points I and II of this brief, and as more fully discussed below, petitioners' contentions are not only spurious, but fictitious, makeshift arguments conjured up to give the appearance of some semblance of legality and justification to their petitions.

A. *The Petitions herein request this Court to settle an alleged point of Federal Law which on proper consideration of the matter has not been disputed or put in issue.*

Implicit in the instant decision of the Second Circuit is the holding that the courts of England do in fact provide petitioners with an adequate and effective remedy. Even the dissent of Oakes, C. J. does not claim that petitioners would be deprived of a remedy if remitted to the courts of England (20b).

In ruling on the issues presented to it, the Circuit Court held:

> "A district Court has discretion to dismiss an action under the doctrine of *forum non conveniens,* however, even though the law applicable in the alternative forum *may be less favorable* to the plaintiffs chance of recovery, *Canada Malting Co., Ltd.* v. *Paterson Steamships,* 285 U.S. 413, 418-20 (1922). A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover. But the issue remains one of balancing the relevant factors, including the choice of law." (10b). [Emphasis supplied]

and further:

> "With all major indicators thus pointing to England as the logical forum even in this jet age, the plaintiff should not be permitted to insist upon our retaining jurisdiction merely because of the possibility that our federal Courts might interpret general maritime law more favorably to their cause or award more liberal damages to them than would the High Court of England." (23b).

At no point in its decision does the Circuit Court state that petitioners should be remitted to a forum where they will have no remedy. Furthermore petitioners, in their briefs, do not point to any such language. Not only do petitioners have a remedy in England (See Point II for further discussion), but the arguments of petitioner Hapag-Lloyd can hardly be taken seriously when they themselves have, both prior to and after the commencement of these actions, instituted suits in England concerning this very matter—actions which are hardly consistent with its present claim that England is not the proper forum.

When considered in its true posture, the petitioners are requesting this Court not to "Settle a Vital Point of Federal Law" (9IIG) but to review on appeal an exercise of sound discretion by the lower Courts.

B. ***Petitioner Hapag-Lloyd's other alleged reason for seeking Certiorari is based on a fictitious conflict which it alleges exists between the Second and Sixth Circuits.***

Petitioners second purported reason for seeking a writ of certiorari rests on an alleged conflict between the Second and Sixth Circuits. Not only are the decisions to which petitioners point not in conflict but they are in complete agreement.

In fact, the decision by the Court of Appeals for the Sixth Circuit in *Ingram Corporation* v. *Ohio River Company*, 505 F.2d 1364 (1974) cites with approval the governing decisions in the Second Circuit, to wit, *Berwind-White, supra*, and *Morania, supra.*

Based on the facts presented to it, the Court in *Ingram, supra*, just as did the Courts in *Berwind-White, supra*, and *Morania, supra,* concluded that the owner was totally indifferent to its responsibilities under the *Wreck Statute*

and that it did not make all reasonable efforts, under the known facts to mark the wreck.

In addition, it should be pointed out that the decisions in *Ingram, supra, Berwin White, supra,* and *Morania, supra,* all involved the application and interpretation of the "Wreck Statute", 33 U.S.C. 409, which by its own terms applies only to navigable waters in the United States.[7]

The instant decision, however, is not concerned with an occurrence on U.S. waters but solely with the issue of whether or not the District Court abused its discretion in granting the motion to dismiss on the ground of *forum non conveniens,* in an action involving a collision in the English Channel.

The Court was not called upon to make any substantive rulings regarding the "Wreck Statute" and nowhere in its decision, either directly or by way of dicta, are any of its prior decisions overruled, modified or changed.

Clearly, any conflict between the Second and Sixth Circuits exist solely in the petitioners' mind *and* were *Ingram* to be decided in either the Sixth or the Second Circuit tomorrow their decision would be exactly the same.

C. *The Death Claimant petitioners alleged claim of conflict between the Second, Fourth, and Tenth Circuits is also completely fictitious.*

Death Claimant petitioners herein have also deliberately attempted to mislead this Court into believing that a conflict exists between the decisions of the Second, Fourth and Tenth Circuits, when in fact there is no such conflict.

The case of *Lekkas* v. *M/V Caledonia,* 443 F.2d 10 (4th Cir. 1971), from which petitioners quote extensively, dealt

[7] A situation which is totally inapplicable to the matter at bar and which has previously been discussed in Point II.

with the issues of jurisdiction and service of process, not *forum non conveniens*. In that case, unlike the matter at bar, *no discovery whatsoever was had*, the defendants having failed to answer interrogatories "about the facts bearing on these issues."

In the case at bar, however, unlike the *Lekkas* case, *supra*, petitioners were given complete and appropriate discovery. A review of all the documents submitted on the discovery issue clearly indicates that petitioners were supplied with all discovery in any way possibly relevant to the issue of *forum non conveniens*.

What is important in the *Lekkas* case, *supra*, however, and what petitioners fail to mention to this court is that the Fourth Circuit limited the requested discovery to the sole issue before the Court and further indicated that the district judge may stay discovery on the merits—exactly what the Court did in the instant matter (6b note 3, 23b).[3]

Insofar as petitioners' arguments concerning the further identification of witnesses, it is sufficient to state that the location of possible witnesses in this action is one of those matters which, "stand out in bold relief" (15b). It is obvious, from a review of all the relevant facts in this matter, that the vast majority of (if not all of) the witnesses, including petitioners, will be available in England. To require respondents to provide a detailed list of witnesses in order to prove the obvious would be an exercise in futility. As stated by Judge Weinfeld in *Noto v. Cia Secula di Armamento*, 310 F. Supp. 639, 648 (S.D.N.Y. 1970):

> "The Court does not act in a vacuum, but upon a *realistic appraisal of facts* in exercising its discretion." [Emphasis supplied.]

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[3] See also the Magistrate's reports of 25 July 1972 (161a) and 24 Oct. 1973 (232a) where the discovery issue was discussed at great length.

It should be noted that discovery here consumed approximately eight months of the District Court's time, involving voluminous affidavits and letters, several lengthy hearings and two separate reports by the Magistrate.

Most of the requested discovery was in no way relevant to the issue of *forum non conveniens*, which was the sole issue before the Court. Petitioners' discovery request amounted to no more than pure harassment and was merely an attempt to short circuit and avoid responding to respondents' motion. In effect, petitioners were attempting to create the very problems which respondents' motion was designed to cure, and were attempting to bootstrap their way into Court. Petitioners were hoping by the use of such tactics to circumvent the motion to dismiss and place themselves in a position after discovery to claim that it would no longer be inconvenient to have a trial of the matter in this forum.

As this Court is aware, the discovery devices provided by the Federal Rules of Civil Procedure were not designed to be used as a weapon or device to maneuver the adverse party into an unfavorable tactical position but to advance the disposition controversies. *Aktiebolaget Vargos, et al.* v. *Clark*, 8 F.R.D. 635 (D. of C. 1949). To facilitate that purpose, the application of the Rules was left to the discretion of the trial court as evidenced by the following language in *United States* v. *Kohler*, 9 F.R.D. 289 (E.D. of Pa. 1949):

> "[2] There is nothing mandatory about the discovery provisions of the Rules. On the contrary, the purpose and intent is evident throughout *to leave their application to the discretion of the trial court* not, of course, an absolute discretion but one controlled and governed, not only by statutory enactments and the well-estab-

lished rules of the common law, but also by considerations of policy and of necessity, propriety and expediency in the particular case at hand." [Emphasis supplied.]

It should also be noted at this point that petitioners never raised any objection concerning the "identity" of witnesses before the District Court or even mentioned it by way of implication. It was only on appeal to the Second Circuit that this makeshift argument was presented for the first time.

Unlike the case of *Chicago* v. *Hugh,* 232 F. 2d 584 (10th Cir. 1956) where only the *number* of proposed witnesses were stated, the petitioners herein were fully aware of the *number, identification* and *location* of virtually all possible witnesses, and in fact were supplied with affidavits from several of these possible witnesses.

As the Circuit Court quite correctly stated:

"But TOT is in England and its officers and records are there. Moreover, Texaco does business in England. The plaintiffs should find their best proof right there, not only with regard to Texaco but also as to any liability on the part of Texpan. In fact, the plaintiffs' cases on liability will depend in large measure upon the knowledge and activities of such witnesses as the employees of TOT and Trinity House, who are not parties to this litigation, but who directly participated in the events which gave rise to it. The United States District Court in New York, however, has no power to subpoena any of these witnesses. It is unlikely that many would be willing to travel to New York to testify; and the cost, in any event, would be prohibitively great. Those witnesses who reside in England are

subject to the compulsory process of her courts; and the others, if willing to testify, could do so there at reasonable expense.

The plaintiffs, moreover, will not be significantly inconvenienced by dismissal. The district court granted the motion on the express condition that Texaco submit to the jurisdiction of the courts in England where, upon court order, personnel will be available to testify and necessary documents may be produced. As the real parties in interest are either German citizens and residents or foreign corporations, it appears that a trial in England, where several are already parties to related suits, would be considerably less burdensome than a trial in New York. The balance of convenience under these circumstances clearly tips in favor of dismissal." (7b-8b)

and further stated:

"The accident occurred right off the British coast where the scene may be viewed with relative ease by the English Court. The key witnesses are located in England and cannot be subpoenaed to appear in New York. Texaco, on the other hand, will be subject to the jurisdiction of the English courts and the defendants may in England assert claims over against Paracas and Trinity House, which they could not do in New York. Furthermore, the overwhelming majority of the other witnesses and real parties in interest (German, Dutch and Italian) are located much closer to England than to the United States." (23b).

Once again petitioners are attempting to create a fictitious conflict in the circuits in order to confuse the issues and gain the ear of this Court.

In summary, Mr. Justice Frankfurter's concluding remarks (in dismissing a Writ of Certiorari in the case of *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 [1955]) would appear to be highly appropriate to the instant petitions:

> ". . . it is very important that we be consistant in not granting the writ of certiorari except in cases involving principles the settlement of which *is of importance to the public as distinguished from that of the parties*, and in cases where there is *a real and embarrassing conflict* of opinion and authority between the circuit Courts of Appeal. (Cases cited)." [Emphasis supplied]

POINT IV

Death-Claimant Petitioners' arguments regarding the Death on the High Seas Act and constitutional rights are erroneous and inapplicable.

Death-Claimant petitioners in their brief complain that they are being deprived of constitutional and statutory rights. However, what petitioners fail to appreciate is that United States law is a total stranger to these actions. Again, analyzing the factual situation in light of the choice of law standards, it is clear that—regardless of which forum hears this matter—foreign law would govern the rights of the deceased German seamen's beneficial claimants. *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953); *Romero* v. *International Operating Co.*, 358 U.S. 354, 381-4 (1959) and *Symonette Shipyards Ltd.* v. *Clark*, 365 F. 2d 464 (5 Cir. 1966).

Furthermore, with regard to death-claimant petitioners' contentions concerning the application of Lord Campbell's Act, the Second Circuit had the following to say:

"It is finally argued that the English courts may choose to apply Lord Campbell's Act rather than the Death on the High Seas Act and that dismissal was, therefore, improper because it might deny relief to certain claimants who would otherwise have a right to recover.

"Under §1 of the Death on the High Seas Act, 46 U.S.C. §761, a suit for damages for wrongful death may be maintained 'for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative.' Under Lord Campbell's Act, on the other hand, 'dependent relatives' are not included. 28 Halsbury's Law of England (3d ed.) 37. But the likelihood that there are any beneficial claimants who would have been entitled to recover in the district court but who will not qualify for recovery in the English courts in conjectural at best.

"The broad principles of choice of law established for Jones Act cases in *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953) were declared equally applicable to cases arising under the general maritime law in *Romero* v. *International Operating Co.*, 358 U.S. 354, 381-4 (1959), and have been applied to suits brought under the Death on the High Seas Act. *Symonette Shipyards Ltd.* v. *Clark*, 365 F. 2d 464 (5 Cir. 1966).

"The governing principle winnowed from these cases is that the plaintiffs can recover under the Death on the High Seas Act only if they are able to establish some significant national contact warranting the application of the statute to non-resident aliens. *Lauritzen* v. *Larsen*, *supra*, 345 U.S. at 582-592. The only American contact in this case is Texaco's alleged supervision of the search.

> "And, although plaintiffs have failed to establish by competent authority the law of the foreign forum, it appears that Lord Campbell's Act applies only when the parties or vessels are British, and, that the English courts otherwise apply the law of the forum with the most significant contacts. 7 Halsbury's Laws of England (3d ed.) 88." (11b-12b).

As can be seen from the above, death-claimant petitioners' whole argument herein is based on an erroneous assumption and would have this court apply the Constitution and statutes of the U.S. to foreign citizens having absolutely no contact with the United States. Such an assumption is not only absurd but if followed to its logical conclusion would provide foreign citizens, who had no contact with the United States, with the unwarranted protection and benefits of the laws of both their own country and that of the United States.

In addition, the cases cited by death-claimant petitioners in support of their arguments all involve situations which are entirely distinguishable on their facts. For example, in petition of *Risdal & Anderson*, 291 F. Supp. 353 the claimants were residing in the United States, were employed aboard an American flag vessel, owned by an American corporation and based their suits on the Jones Act, 46 U.S.C. §688 (suit against employer) in addition to the Death on the High Seas Act. In the case of *The Vulcania*, 32 F. Supp. 815, the plaintiff was a United States citizen, the plaintiff's decedent had been domiciled in the United States and the fateful voyage had begun in New York.

Both of the above cited cases, therefore, involved situations entirely distinguishable from the one at bar and involved substantial contacts with the United States warranting the application of U.S. law. In the instant matter,

however, there is not one single American contact to which petitioners can point.[9]

The remaining cases cited by the petitioners all involve the application of the Jones Act and are again entirely different and distinguishable, not only on their facts but in their underlying rationale. Not one case involving the Death on the High Seas Act has been cited by the petitioners to support their contention that said act is applicable to the action at bar.

As this Court knows, the Jones Act was designated as a piece of labor legislation to protect American seamen (or those likened to American seamen) from injuries incurred in the course of their employment—an employer-employee relationship being necessary for its application. See *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U.S. 783 (1949); *Fink* v. *Shepard S.S. Co.,* 337 U.S. 810 (1949); *Dassigienis* v. *Cosmos Carriers & Trading Corp.,* 321 F. Supp. 1253 (S.D.N.Y. 1970), aff'd, 442 F. 2d 1016 (2nd Cir. 1971); 2 Norris, *The Law of Seaman,* § 659, 670.

The whole basis or rationale behind the extension of Jones Act coverage, was not to protect foreign seamen from strangers who were not their employers, but to place on an equal footing with their brethren, those likened to American seamen insofar as claims against their employers were concerned.

The situation at bar however, is entirely different. Here we are involved with claims by foreign seamen, not against their employers, but against total strangers who are also

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[9] Even petitioners' bare allegation concerning alleged U.S. supervision of the search is completely frivolous and unsupported by any evidentiary proof. Furthermore, such allegation has been denied and refuted by the sworn statement of TOT, the English manager and operator of the vessel (326a, 328a). In any event, the proof of this matter clearly lies in England. (6b & 7b)

foreigners—foreign claimants who have no contact whatsoever with the United States and who are complaining about events which happened abroad in waters in which the United States has absolutely no interest. Furthermore, the present situation is concerned with three vessels which were all owned and operated by foreign corporations under foreign flags involving witnesses and evidence, all clearly located abroad.

As was stated by Justice Jackson, speaking for the Supreme Court in *Lauritzen, supra,* at page 590:

> "Under [plaintiffs'] contention, all that is necessary to bring a foreign transaction between foreigners in [foreign waters] under American law is to be able 'to serve American process on the defendant. We had held it a denial of due process of law when a state of the union attempts to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state . . . Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so farflung that there would be no justification for altering the law of controversy just because local jurisdiction of the parties is obtainable."

Furthermore, his remarks concerning the application of United States statutes at page 577 are particularly applicable:

> "By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."

And again, at page 578, it states:

> "And it has long been accepted in maritime jurisprudence that '. . . if any construction otherwise be

possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on International law, by which one sovereign power is bound to respect the subjects and the rights of all the sovereign powers outside its own territory'. Lord Russell of Killowen in Reg. v. Jameson (Eng.) (1896) 2 QB 425, 430, 12 ERC 227."

In summary, there is not one single American contact that plaintiffs can point to or one single American interest to be protected that would justify the application of the Death on the High Seas Act or any other United States Statute to the situation at bar and petitioners cannot now be heard to complain that they have been denied that which they never had to begin with.

Viewed in any light, it becomes crystal clear that petitioners are not requesting this Court to review an important question of Federal Law, but rather they are seeking a further review of an issue that has already been properly ruled on three times.

Petitioners' bootstrap arguments strain the imagination, abuse the provisions providing for review by means of a Writ of Certiorari and should be rejected out of hand.

CONCLUSION

In summary, it is evident that the present matter does not involve principles of importance to the public, as distinguished from that of the parties. Furthermore, it does not involve questions of Federal Law or any real or embarrassing conflict between the Circuit Courts of Appeal. It is clear that the Circuit Court properly concluded, following careful and detailed consideration, that the District Court did not abuse its discretion and that all major factors dictated dismissal.

In view of the above, the petitioners have failed to show any basis for the issuance of Writs of Certiorari in this matter.

Wherefore it is respectfully submitted that the petitions herein be denied.

Respectfully submitted,

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